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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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LAURA L. WILLIAMS,  
Appellant,

vs.

THE CITY OF SEATTLE,  
Respondent.

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BRIEF OF RESPONDENT

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ORIGINAL

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## **I. STATEMENT OF THE CASE**

The appellant, Laura Williams, claims that early in the morning on a day in November 2005, she slipped on clear ice and fell on or near a sidewalk adjacent to her apartment home in Seattle. CP 63. She claimed that the ice had formed as a result of a water leak from city pipes. CP 63. She asserted in her complaint that the ice was due to a water leak which ran down the street and over the sidewalk. CP 63.

An investigation by the City determined that no water leaks had been reported in the area for over a year before the plaintiff's fall. CP 70, 74. Further investigation by an expert hydrogeologist retained by the City revealed that the surface water in question was due to seepage from a natural spring, and not due to any leak from city water lines. CP 114. The expert further determined that the flow of the surface water from the natural spring was not caused, controlled, altered or changed by the City or by the installation of any sidewalks or roadways. CP 125-26. With or without these structures, the water would seep and flow from the underground springs and down the hill in question. CP 126.

The City moved for summary judgment. CP 54-58. In response, the plaintiff claimed that the source of the water was not relevant. CP 35. She also claimed in her response to the motion that the City had a duty to

“maintain the sidewalk in a manner that did not pose a risk of injury to the plaintiff.” CP 31.

There are NO FACTS asserted by Ms. Williams to establish that the City had any prior notice of any ice formation on the morning of the accident. There are NO FACTS to show that the City had any prior complaints of ice on this sidewalk at any time prior to the plaintiff’s fall.

The court granted the City’s motion. This appeal followed.

## II. ARGUMENT

### A. The Lower Court Correctly Applied the Legal Duty of the City.

What is the duty of a municipality regarding the building and maintenance of sidewalks and other public ways?

The duty of the City is not the “duty to maintain the sidewalk in a manner that did not pose a risk of injury to the plaintiff” as the plaintiff asserts in her brief in response to the City’s motion. CP 31. It is not reasonable or even possible to remove every conceivable potential risk of injury. Instead, the City has a duty to maintain its roads and sidewalks so that they are reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

This duty has reasonable limits. There is no liability for the failure to correct a temporary condition, such as an accumulation of ice or snow, unless the City has prior notice and a reasonable opportunity to respond.

*Niebarger v. City of Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958). The notice can be actual or constructive. In *Niebarger*, no constructive notice could be found based on a time lapse of 15 hours between the snowfall and the accident. The court observed that the “shortest time we have permitted a jury to find as constituting constructive notice as a question of fact is six days.” 53 Wn.2d at 230.

The holding in *Niebarger* was quoted with approval in *Wright v. City of Kennewick*, 63 Wn.2d 163, 381 P.2d 620 (1963). In *Wright*, the snow had been on the ground for two days and the crust of ice had formed only a few hours earlier. There was no constructive notice.

This law was again challenged in *Leroy v. State of Washington*, 124 Wn. App. 65, 98 P.3d 819 (2004). Plaintiff there urged that the holding in *Niebarger* was outdated. *Leroy* urged that weather forecasting had improved and that anti-icing chemicals were superior to the sand used in 1958. Based on this, a jury could find that the State could be held to a duty to anticipate the risk of ice and take steps to avoid it. The court disagreed. Since there was no evidence to show the State had notice of ice at the time and place of the accident before the accident occurred, there was no such duty. Summary judgment was proper.

A similar attack on the *Niebarger* holding was made in *Laguna v. Washington State*, 146 Wn. App. 260, 192 P.3d 374 (2008). As in *Leroy*,

*supra*, plaintiff claimed that a duty existed based on evidence that the defendant admitted that conditions were ripe for ice formation. Again, the appellate court held that “foreseeability of harm does not create the duty to prevent it” and applied the rule that was articulated in *Niebarger*.

In the instant case there is no evidence of the time of the formation of the ice, no evidence of how long the ice had been present, no evidence of freezing temperatures that would have formed ice, and no evidence of actual notice to the City.

Even if there was admissible evidence that the fall was caused by ice, the jury could not speculate on the time the ice complained of had formed. There is no factual basis on which a jury could find that the City had actual or constructive notice of a hazard and the reasonable opportunity to correct the hazard.

**B. The Lower Court Correctly Applied the Common Enemy Doctrine**

Despite the original allegations of the complaint, there is no evidence that any water or ice at the site of the accident resulted from any leakage from City water pipes. It is not disputed that the water in question was seepage from natural springs. CP 114. The plaintiff conceded this in her response to the motion for summary judgment. CP 35. Plaintiff provided no evidence to the contrary. The court granted the plaintiff’s

motion to amend her complaint to incorporate this change in the plaintiff's factual allegation and still granted the City's Motion for Summary Judgment. CP 48.

Under the common enemy doctrine, there is generally no liability placed on a landowner for damage due to surface water. In *Rothweiler v. Clark Cy.*, 108 Wn. App. 91, 98, 29 P.3d 758, 762 (Div. II, 2001), the court held:

For over a century, Washington courts have adhered to the common enemy doctrine. *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 993 P.2d 900 (1999); *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). "In its strictest form, the common enemy doctrine allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one's neighbor." *Currens*, 138 Wn.2d at 861, 983 P.2d 626. Surface waters are defined as diffused waters produced by rain, melting snow, or springs. *DiBlasi*, 136 Wn.2d at 873 n. 2, 969 P.2d 10 (quoting *King Cy. v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963)). In addition, a municipality has no common law duty to drain surface water. *Colella v. King Cy.*, 72 Wn.2d 386, 391, 433 P.2d 154 (1967) (quoting *Ronkosky v. City of Tacoma*, 71 Wash. 148, 153, 128 P. 2 (1912)).

The court added, at 29 P.2d, 758:

Generally, municipal rights and liabilities as to surface waters are the same as those of private landowners within the city. *Phillips v. King Cy.*, 136 Wn.2d 946, 958, 968 P.2d 871 (1998) (citing 18A Eugene McQuillin, *Law of Municipal Corporations* § 53.140, at 307 (3d ed. rev. vol. 1993)).

The plaintiff claims that the City changed the “natural drainage” of the water. She claimed in response to the motion for summary judgment that under *Harkoff v. Whatcom Cy.*, 40 Wn.2d 147, 241 P.2d 932 (1952), the City made the water flow onto the property of others and must be liable for her damages. This contention might have some merit if it was supported by any facts in the record. There are none.

The plaintiff argued this conclusion based on the content of the declaration of Elliott. CP 37. However this argument and conclusion is completely rejected by the second declaration of Mr. Elliott. CP 125-26. The plaintiff cannot create facts by argument, but must argue based on FACTS in the record. There is no evidence of any alteration of the natural flow of the surface water by the City.

Even if the plaintiff could establish that the City altered the natural flow of surface water onto the property of another, could this serve as a basis for tort liability for personal injuries incurred by a pedestrian on a sidewalk? *Harkoff* and all of the cases cited in that decision are property damage cases brought by owners of real property. The plaintiffs in those cases were persons who sustained damage to their property by reason of flooding from water that was re-directed by the defendant. The appellant has never cited any Washington case that found liability for personal

injuries on a sidewalk fall that was based on negligent or intentional diversion of surface waters.

This is a personal injury case. The claims in this case do not involve property damage caused by an alteration of water flow. Rather, the question is whether the City had notice with respect to ice on a sidewalk. Thus, although interesting, the common enemy doctrine really need not be considered by this court on appeal in order to reach the result that is dictated by the underlying facts. The judicial application of the common enemy doctrine to tort cases has been limited to cases involving damage to the *property* of others. *Currens v. Sleek* 138 Wn.2d 858, 865, 983 P.2d 626, 630 (1999).

There is no issue of fact under the common enemy doctrine because this case does not involve property damages. Accordingly, the line of cases addressing the duty of care under *Keller, supra*, dictates the outcome of this matter.

**C. The Court Should Disregard Portions of Appellant's Brief That are not Based on the Record or Are Not Relevant to Issues on Appeal.**

There are many parts of the appellant's brief that contain assertions or information that is not part of the record below. This material should not be considered by the Court. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 1027 (1990). RAP 9.12 specifically bars the court from

considering such evidence and issues when reviewing an order granting a motion for summary judgment. There are also parts of the appellant's brief that are simply not relevant to appeal issues. The respondent has elected not to file a separate Motion to Strike under RAP 17.4. The respondent believes that the parties and the court would not be well served by the filing of a separate pleading, a request to the clerk for a hearing date and an argument on the motion. The respondent also does not request that the brief be stricken under RAP 10.7.

Instead, the respondent respectfully requests that the Court not consider material and arguments in the appellant's brief that should not be in the brief. In the appendix to this brief the respondent has provided an Index/Guide to Appellant's Brief that identifies the parts of the brief that fall into this category. They have been marked NR for material not in the record and NA for material not relevant to the appeal. The appellant is pro se and should be respected and commended for the considerable energy and effort required of a lay person to file a pleading and a brief in the state's highest court. As the appellant points out, the Court should not hold pro se litigants to the same standards as lawyers or raise barriers to their ability to pursue an appeal. However, the respondent should not suffer unfair prejudice because of improper material and arguments that are advanced by an untrained and inexperienced litigant.

In addition, the appellant has recently filed an additional document labeled “end of brief” and may file more supplemental documents with the Court. There is no provision in the Rules of Appellate Procedure that condones such filings.

The respondent respectfully requests that the Court not consider any of the material marked NR or NA on the document in the appendix to this brief and that the court not consider any of the supplemental material filed by the appellant that is not specifically allowed by the Rules of Appellate Procedure. This request is also designed to avoid additional time, costs and fees for both parties and the respondent does not intend to file any request for sanctions.

### **III. CONCLUSION**

There is no such thing as a water-free sidewalk in Seattle. Water on sidewalks whether from rain or from underground springs is unpredictable and impossible to control. The real duty of the City is limited only to “reasonable care”. The mere happening of an accident does not mean that someone has been negligent. If the risk of harm is surface ice on a sidewalk, the City is entitled to notice of the risk.

The court correctly entered summary judgment for the respondent.

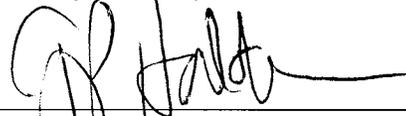
**IV. APPENDIX**

See attached Appendix A-1-A7.

RESPECTFULLY SUBMITTED this 18 day of May, 2010.

PETER S. HOLMES  
Seattle City Attorney

By:



GEORGE P. HALDEMAN, WSBA #29105  
Assistant City Attorney  
Attorneys for Respondent,  
The City of Seattle

**INDEX/GUIDE TO APPELLANT'S BRIEF**

**NR= Not in Record**

**NA= Not relevant to Appeal**

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6	Recital of work orders Second decl of Elliot re evidence of aprons, etc.	

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10	City must have notice Cites Neibarger	
11	Asks court to retrieve her CD and Map from the rejection file Map shows starting 2002 Refers to hearing pertaining assignment of error	NR NR NR
12	2a Owner of big house next to Boyd Called in complaint prior to 2002 Would only talk to professionals-Judge Counsel told her 7-29 was date for SJ	NR NR NR NR
13	Attorney said did not need any of that at hearing Did not wanna tell Judge's name Just sends her bills for \$800.	NR - NR NR
14	3a Has ambulance report Black ice on report Doctor asked ??? Hardware, metal screw Time in hospital	NR NR NR NR NR
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## CERTIFICATE OF SERVICE

Hazel Haralson states and declares as follows:

1. I am over the age of 18, not a party to the within action, am competent to testify in this matter, am an employee of the Seattle City Attorney's Office, and make this declaration based on my personal knowledge and belief.

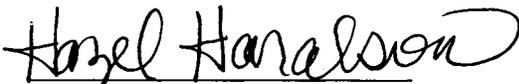
2. On May 18, 2010, I requested ABC Legal Messengers to serve, by May 19, 2010, a true and correct copy of the subjoined "Brief of Respondent" upon the following appellant:

Laura A. Williams  
6900 South 123<sup>rd</sup> Street, Apt H-199  
Seattle, WA 98178

and to file the original with the Supreme Court of the State of Washington.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18<sup>th</sup> day of May, 2010, at Seattle, King County, Washington.

  
Hazel Haralson